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No. 76-1382

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN ARTHUR SCOTT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum discusses three cases decided by this Court after our petition was filed.

1. *United States* v. *Lovasco*, No. 75-1844, decided June 9, 1977, establishes beyond serious dispute that the district court erred in dismissing Count I of the indictment in this case. The district court concluded that the government made an "intentional choice" to delay seeking an indictment, "with the principal motive being to gather evidence of further crimes" by respondent (Pet. App. 8a).[1]

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[1]Agent Stephen Young testified that the investigation of respondent had been continued to determine whether other police officers were involved in drug transactions, to ascertain the source of respondent's drugs, and to allow the purchase of drugs from respondent by a federal agent rather than by an informant (Tr. 292-294).

Lovasco makes it clear that delay for the purpose of pursuing a criminal investigation does not offend the Due Process Clause of the Fifth Amendment, even if a potential defendant is prejudiced by the delay.

2. *Lee* v. *United States*, No. 76-5187, decided June 13, 1977, and *Finch* v. *United States*, No. 76-1206, decided June 29, 1977, establish benchmarks against which the double jeopardy issue of this case may be measured. *Finch* held that if charges are dismissed on their merits by the district court after jeopardy has attached, no further proceedings may be held unless the district court or the jury also rendered a finding or verdict of guilt that may be reinstated. *Lee* held that when an indictment or information is dismissed in mid-trial on the defendant's motion for a reason not inconsistent with reprosecution, a second trial on a proper charge does not violate the Double Jeopardy Clause.

This case presents a question that neither *Lee* nor *Finch* addressed: May there be a second trial when an indictment is dismissed with prejudice in mid-trial, on the defendant's motion, for a reason that is unrelated to guilt or innocence? Although the Court explained in *Lee* (slip op. 7) that a second trial is barred when dismissal "is granted on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged," we submit that the scope of this principle needs clarification, and that it properly should be applied only to dismissals based upon some determinations of the guilt or innocence of the defendant, the aspect on which we believe the Court was focusing in this discussion.

A defendant who obtains a ruling in his favor by the district court constituting "a legal determination on the basis of facts adduced at trial relating to the general issue

of the case"[2] has a recognized interest in preserving the district court's ruling. Whatever the label, a true acquittal during trial has been accorded by the Double Jeopardy Clause a very special sort of finality.[3] Once a defendant has been acquitted at trial, the Double Jeopardy Clause interdicts further attempts to convict him. *Green* v. *United States*, 355 U.S. 184, 187-188.

In contrast to *Lee*, *Finch* involved a finding by the district court absolving the defendant of criminal responsibility; the district court concluded that the defendant had not committed any crime. There was no such ruling by the district court here. A district court's ruling is an acquittal "only if it 'actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'" *Lee* v. *United States*, *supra*, slip op. 6 n. 8, quoting from *United States* v. *Martin Linen Supply Co.*, No. 76-120, decided April 4, 1977, slip op. 7. The district court in the present case denied respondent's motion for an acquittal based on the sufficiency of the evidence (Tr. 300-302) and decided, instead, that respondent should be released whether or not he was guilty of the crime charged by Count I. Whatever significance that action might have, it was not a resolution of the general issue of guilt or innocence.

Although the district court did not contemplate that respondent could be reprosecuted after the dismissal for preaccusation delay, we believe that the trial judge's subjective assessment of the effect of his action should

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[2] *Serfass* v. *United States*, 420 U.S. 377, 393, quoting from *United States* v. *Sisson*, 399 U.S. 267, 290 n. 19.

[3] *United States* v. *Martin Linen Supply Co.*, No. 76-120, decided April 4, 1977, slip op. 6-7, 11; *Lee* v. *United States*, *supra*, slip op. 6-7 n. 8.

not control its double jeopardy consequences. Respondent would be exposed, at a second trial, to no greater expense or anxiety than Lee was, yet this Court concluded that Lee's second trial was proper. The second trial is necessary—here, as in *Lee*—in order to subject respondent to his *first* decision on guilt or innocence.

The first trial of respondent did not end because of prosecutorial or judicial overreaching; it ended, as in *Lee*, by a favorable judicial response to a motion the defendant himself had made. As in *Lee*, the defendant could have avoided the mid-trial termination, and obtained the verdict of the jury, by the simple expedient of asking the court to allow the case to proceed to verdict before ruling on the claim of impermissible pre-indictment delay. Here, as in *Lee* and *United States* v. *Dinitz*, 424 U.S. 600, the defendant "exercised his choice in favor of terminating the trial" before verdict; the proceedings "were terminated at the defendant's request and with his consent" (*Lee* v. *United States*, *supra*, slip op. 9, 10). "[C]ounsel offered no objection when the court * * * decided to terminate the proceedings without having entered any formal finding on the general issue" (*id.* at 10).

In *Lee* the first trial was terminated because of the prosecutor's error in drafting the information; here the only error was that committed by the district court in dismissing the indictment at respondent's request. Respondent had it within his exclusive power to obtain a definitive resolution of his guilt or innocence in a single trial. He could have postponed his motion or requested the district court to rule upon it after the jury had returned its verdict. If the jury had acquitted him, that would have been the end of the matter, and if it had convicted him, the district court and the court of appeals

could have resolved the question of preaccusation delay without the necessity of a second trial. See *United States* v. *Wilson*, 420 U.S. 332. We have argued elsewhere that a district court always should postpone until after verdict ruling upon a motion to dismiss for preaccusation delay;[4] the district court's error in ruling before verdict was induced by respondent, and it should not stand as a bar to further proceedings if the district court erred on substance as well as on procedure.

We submit, in sum, that when a defendant seeks and obtains a mid-trial dismissal for reasons that do not amount to an "acquittal," he may be tried a second time if he led the district court into error.[5] The defendant's desire to avoid even one ruling on guilt or innocence, and the costs to him of a second trial, must be subordinated to "the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter*, 336 U.S. 684, 689.

3. The Court has granted review in *Sanabria* v. *United States*, No. 76-1040, certiorari granted, June 27, 1977, which is discussed in our petition. *Sanabria*, like *Lee*, involves a termination based upon a perceived defect in the charge, and the central question in *Sanabria* is whether the termination amounted to an "acquittal." The present case involves a termination based on the

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[4]See pages 40-48 of our brief in *United States* v. *Lovasco*, *supra*. The Court did not reach this argument in *Lovasco* (see slip op. 5 n. 7).

[5]For example, it should not have made a difference in *Lee* if the defendant, instead of asking for an ordinary dismissal of the information, had asked for and received a dismissal *with prejudice* because of the drafting error. In either event the defendant's interests in avoiding a second trial would be the same, and a second trial should be permissible because the district court did not resolve the general issue in favor of the defendant.

district court's belief that the defendant (for reasons unrelated to his guilt) could never be successfully prosecuted. The Court's disposition of the "acquittal" problem in *Sanabria* therefore is unlikely to control this case, and it would be advantageous to the lower federal courts for this Court to resolve the status of dismissals that do not go to the general issue of guilt or innocence. It therefore should set the present case for plenary review.

Respectfully submitted.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

JULY 1977.

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*The Solicitor General is disqualified in this case.

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